No. 83-1204

In the Supreme Court of the United States

OCTOBER TERM, 1983

SUSAN LEE CULTEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 25 U.S.C. 464 requires that Indian wills devising trust property comply with state probate laws.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A19) is reported at 713 F.2d 1455. The opinion of the district court (Pet. App. B1-B3) is unreported. The opinion of the Interior Board of Indian Appeals (Pet. App. B4-B24) is reported at 9 IBIA 43. The opinion of the administrative law judge (Pet. App. B30-B46) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1983. A petition for rehearing was denied on October 20, 1983 (Pet. App. C1). The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 4, 1976, William Mason Cultee, an enrolled Quinault Indian, died, leaving a will dated August 14, 1973. This will had been prepared for him by, and executed in the presence of, Bureau of Indian Affairs (BIA) personnel. By this will, Cultee left his entire estate to a cousin, respondent Helene Jake, with whom he had resided during the latter part of his life.[1]

2. Petitioners challenged the validity of the will in an administrative proceeding, claiming to be the children of decedent Cultee. They argued that Cultee lacked the testamentary capacity to execute a will; that the beneficiary under the will had exerted undue influence on Cultee; and that the will did not comply with a departmental regulation instructing BIA personnel to assure that children to be disinherited be named in the will. Following a hearing, the administrative law judge entered an order determining the will to be valid with respect to the entire estate (Pet. App. B30-B46), with the exception of certain land located on the Nisqually and Puyallup Reservations that could be distributed only to Cultee's heirs at law (*id.* at B44). The ALJ

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[1]This will, typed on the standard BIA form, contained the following provisions (Pet. App. A16):

> *FIRST. — I desire that all my legal debts be paid, including the expenses of my last illness, funeral, and burial.*
>
> *SECOND. — I give, devise, and bequeath to* — my first Cousin, HELENE MOWITCHMAN BLACK JAKE, Quinault allottee 2031, all of my estate: real, personal or mixed, of whatsoever kind and nature and whatsoever situated, of which I may die seized or ever shall be possessed.
>
> THIRD. — To anyone making any claim against my estate — real or personal, I leave nothing.
>
> FOURTH. — I hereby declare that as of the date of this instrument, I am a single person; and that I have no children.

The italicized portion was preprinted on the BIA form.

found that a preponderance of the evidence established that Cultee was the father of the four petitioners (*id.* at B34), and therefore petitioners were entitled to inherit the Nisqually and Puyallup land (*id.* at B44). The Interior Board of Indian Appeals affirmed (*id.* at B4-B24).

3. On September 28, 1981, petitioners filed a complaint in the United States District Court for the Western District of Washington contending: (1) that the Department of the Interior's failure to follow its instructions regarding naming children in a will was a denial of due process; (2) that the failure to follow that instruction was also a violation of 25 U.S.C. 373; and (3) that the approval of the will was an abuse of discretion and arbitrary and capricious. Petitioners subsequently amended their complaint to include a fourth ground for relief, namely, that the Department's failure to promulgate regulations protecting pretermitted heirs was a denial of due process and equal protection. In their brief in response to respondent Jake's motion to dismiss, petitioners advanced for the first time the argument they now urge to this Court: namely, that 25 U.S.C. 464 requires that Indian wills disposing of trust property comply with state law[2] and, hence, that Cultee's will was invalid for failure to comply with Washington's pretermitted heir statute, Wash. Rev. Code 11.12.090 (1974) (set forth at Pet. App. D18).[3]

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[2]The text of 25 U.S.C. (1976 ed.) 464 is set forth at Pet. App. D12-D13. That statute was amended in 1980 by substituting for the phrase "heirs of such member" the more expansive category of "heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust." The amendment does not apply to this case and, in any event, would have no effect on its resolution.

[3]Petitioner contends that under Washington law Cultee could disinherit his children only by naming them in the will. The statement that he had no children would not be sufficient. See Pet. 7.

The district court granted respondent Jake's motion for summary judgment on the ground that "25 U.S.C. § 373 permits an allottee to dispose of his property in any way he wishes provided his will is approved by the Secretary of the Interior before or after [the] testator's death" (Pet. App. B2). The district court did not specifically address the relevance of the state statute.

The Ninth Circuit affirmed (Pet. App. A1-A16). The court rejected petitioners' contention that 25 U.S.C. 464 requires Indian wills disposing of trust property to comply with all the particulars of state probate law. The court explained that Indian wills devising restricted property are subject to the requirement of 25 U.S.C. 373 that they be approved by the Secretary of the Interior. Section 464 establishes a further limitation on the persons or entities to whom an Indian may devise trust property, limiting such bequests: (1) to the Indian tribe where the land is located; (2) to any member of that tribe; or (3) to any "heirs" of the testator. The Court explained that the reference to state law in the statute simply designated state law as the source for defining these limitations, specifically, the term "heirs." Pet. App. A9-A12. Thus, the court concluded (*id.* at A12): "The reference to state law in § 464 does not, as [petitioners] argue, require an Indian devise of restricted lands to comply with state probate law. Rather, it defines the class of permissible devisees of such lands."

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, it does not warrant review by this Court.

1. Petitioners argue (Pet. 5-7) that a "plain grammatical reading" of 25 U.S.C. 464 shows that Congress intended to incorporate state law in Indian probate "to fill the gaps in

federal law." This reading is plainly mistaken. The statute requires that restricted Indian lands or shares in the assets of an Indian tribe or corporation organized under the Indian Reorganization Act (25 U.S.C. (1976 ed.) 464 (emphasis added)):

> descend or be devised, in accordance with the then existing laws of the State, *or Federal laws where applicable*, in which said lands are located * * * to any member of such tribe * * * or any heirs of such member.

Therefore, the statute, enacted in 1934, clearly continues to respect preexisting federal law embodied in 25 U.S.C. 373, which establishes that Indian wills devising trust allotment lands are subject to approval by the Secretary of the Interior, but not to the nuances of state probate law.

In *Blanset* v. *Cardin*, 256 U.S. 319 (1921), the Court made plain that Indian wills are free from generally applicable state probate restrictions. The Court stated (*id.* at 326-327):

> [I]t was the intention of Congress that this class of Indians should have the right to dispose of property by will under this act of Congress, free from restrictions on the part of the State as to the * * * objects of the testator's bounty, provided such wills are in accordance with the regulations and meet the approval of the Secretary of the Interior.

Subsequent decisions, even after the enactment of Section 464, have not deviated from this view. See, *e.g.*, *Tooahnippah* v. *Hickel*, 397 U.S. 598, 613 (1970); *Blundell* v. *Wallace*, 267 U.S. 373, 377 (1925); *Akers* v. *Morton*, 499 F.2d 44, 47-48 (9th Cir. 1974); *Homovich* v. *Chapman*, 191 F.2d 761, 764 (D.C. Cir. 1951); *Hanson* v. *Hoffman*, 113

F.2d 780, 789 (10th Cir. 1940).[4] The Department's administrative rulings likewise reflect the view that the federal law governing wills disposing of Indian trust property excludes the general application of state probate law. See, *e.g.*, *Estate of Carrie Standing Haddon Miller*, 10 I.B.I.A. 128 (Oct. 5, 1982) (state formalities regarding execution of wills not applicable to Indians' wills); *Estate of Roe Kahrahrah*, 81 Interior Dec. 613 (1974) (state substantive requirements regarding pretermitted heirs not applicable to Indian wills). And, as the court of appeals noted (Pet. App. A11-A12), when Congress recently amended the statute (see note 2, *supra*), it recognized and approved this administrative interpretation of Section 464. H.R. Rep. 96-1285, 96th Cong., 2d Sess. 2 (1980). Against this background, petitioners point to nothing in the legislative history of Section 464 to indicate that it was intended to work such a fundamental change in the law.[5]

2. Petitioners contend (Pet. 5-7) that the decision below conflicts with *Rice* v. *Rehner*, No. 82-401 (July 1, 1983). The short answer to this contention is that *Rehner* has nothing to do with this case. In *Rehner*, the Court held that 18 U.S.C. 1161 authorized a state to subject a store on an Indian reservation, which sold liquor for off premises

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[4]Indeed, Justice Harlan's concurring opinion in *Tooahnippah*, in recognizing that the *Secretary* might pass a regulation analogous to state pretermitted heir statutes, quite clearly demonstrates the Court's understanding that state probate laws do not apply to Indian wills devising trust property. See 397 U.S. at 619 n.10.

[5]The reference to state law in Section 464 is not superfluous under the court of appeals' holding. If the Indian dies intestate, Section 464 requires that the property descend in accordance with the intestate succession of the state in which the land is located. Similarly, Section 464 limits the Secretary's discretion in approving wills devising trust property. One of the three permissible classes of devisees are "heirs" of the testator, as defined by state law. See Pet. App. A11.

consumption, to state liquor licensing. The statute involved in *Rehner* and the general area of law are radically different from that involved here.

First, the language of 25 U.S.C. 464 explicitly recognizes and retains federal law where it is applicable; the language of 18 U.S.C. 1161 does not. Rather, Section 1161 provides that liquor transactions in Indian country are not prohibited under federal law provided "those transactions are 'in conformity both with the laws of the State * * * and with an ordinance duly adopted by the tribe * * *.'" *Rice* v. *Rehner*, slip op. 2. This Court read this statute as delegating authority to the states and the tribes to regulate the distribution and use of alcoholic beverages. But 25 U.S.C. 464 does not explicitly delegate authority to the states or incorporate state probate law and should not be read that way since the statute specifically recognizes and retains all applicable federal law in Indian probate.

Second, in contrast to the history of concurrent state and federal control over the distribution of alcoholic beverages on Indian reservations, there is no historical tradition of concurrent state and federal jurisdiction over Indian probate with respect to trust property.[6] Descent and distribution of trust allotments, such as are involved here, are governed by federal statutes. See generally 25 U.S.C. 371-380. As noted above, 25 U.S.C. 373 vests the exclusive authority to determine the validity of a will with the Secretary of the Interior.[7] And, as noted earlier, the longstanding

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[6]Unrestricted or non-trust property owned by deceased Indians is generally subject to the jurisdiction of the tribe or the state, depending on where the deceased Indian was domiciled and whether the property is located within Indian country. See *Blundell* v. *Wallace*, *supra*; *Jones* v. *Meehan*, 175 U.S. 1 (1899).

[7]This Court has held, however, that the Secretary's authority under 25 U.S.C. 373 to disapprove a will is not unlimited; it must be exercised to give effect to the deceased Indian's intent unless the disposition is "so

interpretation of the responsible agency here is that Section 464 does not incorporate state probate law. In *Rehner*, by contrast, the Court noted that an opinion of the Solicitor of the BIA supported the view that state licensing laws were applicable. Slip op. at 15-16.

Finally, a state's interest in regulating the sale and distribution of alcoholic beverages differs significantly from any interest it may have in the probate of restricted Indian property. The probate of restricted property has no "spill-over effect," *i.e.*, it has no off-reservation effect that necessitates state intervention. Compare *Rice* v. *Rehner*, slip op. 10-11. Pursuant to Section 464 itself, only members of a tribe or the specified heirs of a member of a tribe may receive restricted Indian lands by descent or devise. The state has no interest in imposing its probate laws on the devise of restricted Indian lands.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

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lacking in rational basis that the Secretary's approval could reasonably be withheld * * *." *Tooahnippah* v. *Hickel*, 397 U.S. at 610. Under petitioner's view, however, state probate law would override Cultee's desire to leave his property to the cousin with whom he had lived, rather than leave it to these children whom he did not recognize as his own.

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